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Howing Co. v. Nationwide Corp.: The Sixth Circuit Provides the "Solution" to *Virginia Bankshares'* Causation Query

INTRODUCTION

The litigants in the Sixth Circuit's recently decided *Howing Co. v. Nationwide Corp. (Howing III)*¹ have found themselves, for the second time, at the forefront of the law's evolution.² Beginning with the 1982 decision of Nationwide's directors to take the corporation private through a freeze-out merger,³ the litigants have spent the past ten years rotating among the various courts of the federal system. The issues that the courts have confronted have revolved around section 13(e) of the Securities Exchange Act of 1934⁴ and

¹ 972 F.2d 700 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1645 (1993) [hereinafter *Howing III*].

² In its first decision concerning the *Howing* litigation, the Sixth Circuit became the first court of appeals in the nation to recognize an implied private right of action under § 13(e) of the Securities Exchange Act. *See Howing Co. v. Nationwide Corp.*, 826 F.2d 1470, 1474 (6th Cir. 1987) [hereinafter *Howing I*].

³ *See Howing Co. v. Nationwide Corp.*, 625 F. Supp. 146 (S.D. Ohio 1985). In general, "going private" occurs when the ownership of a corporation is significantly contracted by a majority shareholder or some other controlling group and is usually accomplished through one or two transactions. For example, when a diffuse group of shareholders own a large percentage of a class of a corporation's shares, the first step in "going private" will often be a tender offer. Once enough outside shareholders have been eliminated, the corporation can seek to further concentrate ownership through compulsory means. A merger accomplished by the compulsion of some or all of the minority shareholders is commonly termed a "freeze-out." *See Committee on Corporate Laws, Guidelines on Going Private*, 37 BUS. LAW. 313, 314-15 (1981). For further information on "going private" and "freeze-out" transactions, see generally John P. McGarrity, *Freezeouts Under the 1983 Illinois Business Corporation Act: The Need for Protection of Minority Shareholders from "Going Private" Mergers*, 1985 U. ILL. L. REV. 679, 681-83 (1985); Edward D. Kleinbard, Note, *Going Private*, 84 YALE L.J. 903, 909-11 (1975).

⁴ Section 13(e), codified at 15 U.S.C. § 78m(e) (1988), was added along with § 13(d) and §§ 14(d)-(f) as part of the Williams Act in 1968. These provisions resulted, in part, from a growing concern over corporate takeover attempts and the perceived unfairness to an investor who finds himself in the midst of a struggle for corporate control. While in its early drafting stages the Williams Act had been seen as a device to foil corporate raiders, the law as enacted gave neither management nor the party seeking to gain control of the corporation any advantage over the investor. Conforming to the

Rule 13e-3 issued pursuant to it⁵ and have principally concerned whether adequate disclosure was made by Nationwide to its shareholders during the merger and, if not, what harm was caused the shareholders. Specifically, in *Howing III* the court addressed the following question: Does it matter whether adequate disclosure is made when the party favoring the merger already possesses the votes needed to approve it?⁶

In *Virginia Bankshares, Inc. v. Sandberg*,⁷ the Supreme Court at least partially answered that question.⁸ The case involved former shareholders of a subsequently merged corporation who claimed damages, based on inadequate disclosure, arising from the merger.⁹ Remarking that the former shareholders were members of a class of minority shareholders without enough votes to block the merger¹⁰ and without any legal rights that could have prevented the merger or mitigated any resulting damages, the Court rejected their claim.¹¹ The Court held that the shareholders could not show that, had adequate disclosure been made, they would not have suffered harm.¹²

What was left unanswered by *Virginia Bankshares* was whether minority shareholders who do have such legal rights can claim damages. More particularly, if the lack of adequate disclosure induces the shareholders to forego a state law remedy, can causation be satisfied so as to show damages arising from a violation of the federal securities laws?¹³ This Note shall analyze the Sixth Circuit's resolution of that question in *Howing III*.¹⁴ Part I provides a brief explanation of Rule

Williams Act's "neutral" approach, § 13(e) gives the Securities and Exchange Commission the authority to regulate a corporation's repurchase of its own securities. *See generally* 5 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 2161-67 (3d ed. 1990) (discussing the history of the Williams Act).

⁵ 17 C.F.R. § 240.13e-3 (1992); *see infra* notes 32-49 and accompanying text (discussing the reporting requirements of § 13(e) and Rule 13e-3).

⁶ *Howing III*, 972 F.2d 700, 705 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1645 (1993).

⁷ 111 S. Ct. 2749 (1991). *Virginia Bankshares* concerned Rule 14a-9 rather than 13e-3. *See infra* notes 19-23 (distinguishing Rule 14a-9 from Rule 13e-3).

⁸ *See infra* notes 137-51 and accompanying text (outlining the *Virginia Bankshares* decision).

⁹ *Virginia Bankshares*, 111 S. Ct. at 2756.

¹⁰ *Id.* at 2761.

¹¹ *Id.* at 2766.

¹² *Id.* at 2755.

¹³ *See id.* at 2766.

¹⁴ It is the attempt of this Note to examine the last state remedy causation issue as it was presented before the Sixth Circuit. To that end, it will focus narrowly on issues of relevance to causation and the Supreme Court's decision in *Virginia Bankshares*. It will

13e-3, and then recounts the saga of the *Howing Company* cases culminating in *Howing III*.¹⁵ Part II surveys the development of the doctrine concerning causation of damages in suits based upon implied private rights of action under the federal securities disclosure laws.¹⁶ Part III addresses the Sixth Circuit's synthesis of *Virginia Bankshares* and earlier cases in reaching its conclusion that a foregone state law remedy is sufficient to show causation.¹⁷ Finally, Part IV questions the correctness of the Sixth Circuit's decision.¹⁸

I. FROM RULE 13e-3 AND ITS BRETHREN TO *HOWING III*

A. Rule 10b-5, Rule 14a-9, and Rule 13e-3

Rules 10b-5, 14a-9, and 13e-3 are the subjects of a great deal of judicial interplay. While Rule 10b-5¹⁹ concerns the purchase and sale of securities, Rule 14a-9²⁰ concerns proxy solicitations and Rule 13e-3²¹ concerns "going private"²² transactions, the similarity of language and purpose among the three rules often leads courts to treat reasoning applicable to one rule as equally applicable to the others. For example, each rule stresses that, in whatever context a shareholder is contacted, the shareholder must have all relevant facts assembled before him in such a

not discuss concerns about using the federal courts to enforce state law remedies, such as those raised by the Court in *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977).

In *Santa Fe*, the Supreme Court was confronted with the Second Circuit's holding that Rule 10b-5, *see infra* notes 19-27 and accompanying text, reached breaches of fiduciary duty even in the absence of faulty disclosure. *Santa Fe Indus.*, 430 U.S. at 470. The Court rejected that interpretation of Rule 10b-5. *Id.* at 474-77. Furthermore, in Part IV of the opinion, the Court expressed grave reservations about extending the federal securities laws into areas traditionally left to state corporate law without clear Congressional authority. *Id.* at 477-80.

¹⁵ *See infra* notes 19-94 and accompanying text.

¹⁶ *See infra* notes 95-151 and accompanying text.

¹⁷ *See infra* notes 152-77 and accompanying text.

¹⁸ *See infra* notes 178-206 and accompanying text.

¹⁹ 17 C.F.R. § 240.10b-5 (1992).

²⁰ *Id.* § 240.14a-9.

²¹ *Id.* § 240.13e-3. Depending upon the precise form of a subject transaction, the rule requires disclosure of certain information in "the proxy statement, the information statement, the registration statement or the tender offer for or request or invitation for tenders of securities published, sent or given away to security holders, respectively." *See id.* § 240.13e-3(e)(1).

²² *See supra* note 3 (defining "going private" transactions).

fashion that no misleading impression is made.²³ Thus, the emphasis of each rule is full disclosure.²⁴

Despite the absence of express private rights of action in the sections of the securities acts upon which these rules are based,²⁵ courts have implied rights of action for persons who have suffered injuries as a result of another's violation of the rules. The Supreme Court has long

²³ Compare the language of Rule 10b-5:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

....

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, . . . in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1992), with that of Rule 14a-9(a):

No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

17 C.F.R. § 240.14a-9(a) (1992), and that of Rule 13e-3(b)(1):

It shall be a fraudulent, deceptive or manipulative act or practice, in connection with a Rule 13e-3 transaction, for [a Rule 13e-3 issuer] directly or indirectly

....

(ii) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading;

17 C.F.R. § 240.13e-3(b)(1)(ii) (1992).

²⁴ 10b-5(a) and 10b-5(c) also contain provisions concerning fraud that are identical to those of 13e-3(b)(1)(i) and 13e-3(b)(1)(iii), respectively. See 17 C.F.R. § 240.10b-5(a), (c) (1992); *id.* § 240.13e-3(b)(1)(i), (iii); see also *infra* note 25 (describing the statutory authority for these rules). Although the cited provisions of Rules 10b-5 and 13e-3 serve important anti-fraud purposes beyond full disclosure, the provisions are primarily disclosure provisions and are, therefore, readily comparable to Rule 14a-9.

²⁵ Rules 10b-5 and 14a-9 are issued in accordance with §§ 10(b) and 14(a) of the Securities Exchange Act of 1934 (codified at 15 U.S.C. § 78j(b) (1981) and 15 U.S.C. § 78n(a) (1981), respectively). Rule 13e-3 is issued under the authority of §§ 17(a) and 19 of the Securities Act of 1933, and §§ 3(b), 10(b), 13(e), 14(a), 14(c), 14(e) and 23(a) of the Securities Exchange Act of 1934. See Exchange Act Release No. 33,610, 44 Fed. Reg. 46,736, 46,736 (Aug. 8, 1979).

recognized private rights of action for violations of 14a-9²⁶ and 10b-5.²⁷ However, since the Supreme Court's 1975 decision in *Cort v. Ash*,²⁸ the Court has become increasingly uneasy about implying private rights of action from statutes.²⁹ Consequently, while some lower courts have implied a private right of action under Rule 13e-3,³⁰ there is a vigorous debate over whether implying such a private right of action is proper.³¹

Section 13(e) concerns issuer repurchases of its own stock.³² Rule 13e-3 applies³³ if those repurchases have a "reasonable likelihood or a purpose"³⁴ of either causing the stock to be held "by less than 300 persons" or disqualifying a class of equity securities that are listed on a national securities exchange or authorized to be quoted on an automated trading system from such a listing.³⁵ Considering that the common elements behind these two results are the cessation of any significant

²⁶ J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964).

²⁷ Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 (1971). Unlike a 14a-9 right of action, the Court has held scienter to be a prerequisite to a private action under Rule 10b-5. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976).

²⁸ 422 U.S. 66, 78 (1975) (outlining a four-factor test for determining whether a court can imply a private cause of action in a statute that does not expressly provide for one).

²⁹ See THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* § 13.1 (2d ed. 1990).

³⁰ See, e.g., *Howing I*, 826 F.2d 1470, 1476 (6th Cir. 1987).

³¹ Compare *Going Private Transactions by Public Companies or Their Affiliates*, Exchange Act Release No. 34-14185, 42 Fed. Reg. 60,090, 60,099-60,100 (Nov. 23, 1977) (endorsing an implied private right of action under Rule 13e-3) and Mary C. Burson, Note, *Securities Law: An Argument for Recognition of an Implied Private Cause of Action for Shareholders Under Section 13(e) of the Securities Exchange Act of 1934 in the Context of Going Private*, 64 NOTRE DAME L. REV. 606 (1989) (arguing for a private right of action) with Ndiva Kofele-Kale, *Some Unfinished Business, Some Unresolved Issues: Section 13(e) and the SEC's Going-Private Rules after Howing Co. v. Nationwide Corp.*, 20 U. TOL. L. REV. 625, 632-53 (1989) (criticizing the *Howing* court's recognition of a private right of action).

³² See *supra* note 4 (discussing enactment of § 13(e)). Rule 13e-3 also applies to "affiliates" of the issuer, defined as persons "that directly or indirectly through one or more intermediaries [control, are] controlled by, or [are] under common control with such issuer." 17 C.F.R. § 240.13e-3(a)(1) (1992).

³³ Rule 13e-3 applies to a corporation whose equity would be required to be registered under § 12 of the Securities Exchange Act or a "closed-end investment company registered under the Investment Company Act of 1940." 17 C.F.R. § 240.13e-3(b)(1) (1992). Rule 13e-3 also applies to an issuer of securities subject to § 15(d) of the Securities Exchange Act, but the requirements are somewhat different for such an issuer. See *id.* § 240.13e-3(c); see *infra* note 36 (distinguishing § 12 from § 15(d) issuers).

³⁴ 17 C.F.R. § 240.13e-3(a)(3) (1992).

³⁵ *Id.* § 240.13e-3(a)(3)(ii).

public or private reporting requirements to the shareholders³⁶ and a significant reduction in the available market for selling the securities, a minority shareholder of a company that has undergone a Rule 13e-3 transaction is in a significantly weakened position.³⁷ Consequently, Rule 13e-3 constitutes such a shareholder's last opportunity to have the advantage of extensive reporting requirements.

Schedule 13E-3³⁸ explains what a company undergoing a Rule 13e-3 transaction must disclose. The schedule must be filed with the SEC³⁹ and distributed to the shareholders.⁴⁰ Although most of the items on the schedule concern ordinary information that would have to be disclosed in many other securities transactions,⁴¹ Items 7, 8, and 9 are quite different.⁴² Item 7 requires disclosure of the purpose of the transaction, its likely effects, the reasons for its structure, and whether any alternatives to it exist.⁴³ Item 9 requires information relating to outside opinions on the value of the shares and the fairness of the transaction.⁴⁴ Item 8, the most controversial portion⁴⁵ of Schedule 13E-3, is the broadest in scope.

Item 8(a) requires the party filing the schedule to state whether it "reasonably believes that the Rule 13e-3 transaction is fair or unfair" to parties not connected with the transaction.⁴⁶ A statement that the issuer

³⁶ The Securities Exchange Act imposes periodic reporting requirements on securities registered under § 12. Section 12 requires registration of securities traded on a national securities exchange, 15 U.S.C. § 78l(a) (1988), and of equity securities of issuers with more than \$1,000,000 in assets that are held by 500 or more persons and traded in interstate commerce. *Id.* § 78l(g)(1). The Securities Exchange Act also imposes periodic reporting requirements on securities subject to § 15(d), which applies to securities held by 300 or more, but less than 500 persons. *Id.* § 780(d).

³⁷ See Kleinbard, *supra* note 3, at 916-17.

³⁸ 17 C.F.R. § 240.13e-100 (1992).

³⁹ *Id.* § 240.13e-3(d).

⁴⁰ *Id.* § 240.13e-3(e). One item, Item 17, requires that certain exhibits be filed with the SEC, but does not require that the exhibits be sent to the shareholders. See *id.* § 240.13e-100, Item 17.

⁴¹ E.g., 17 C.F.R. § 240.13e-100 (1992) (name of issuer and class of security); see Kofele-Kale, *supra* note 31, at 668-69 (discussing general disclosure information under Items 1-6 and 10-15 of Schedule 13E-3).

⁴² See Kofele-Kale, *supra* note 31, at 669-70 (comparing and contrasting Items 7, 8, and 9).

⁴³ See 17 C.F.R. § 240.13e-100, Item 7 (1992). The effects that must be described include the effects on the issuer and on shareholders not affiliated with the issuer. *Id.*

⁴⁴ See *id.* § 240.13e-100, Item 9.

⁴⁵ See Harold N. Iselin, Note, *Regulating Going Private Transactions: SEC Rule 13e-3*, 80 COLUM. L. REV. 782 (1980) (arguing that Item 8 exceeds the SEC's rulemaking authority by indirectly regulating the substantive fairness of Rule 13e-3 transactions).

⁴⁶ 17 C.F.R. § 240.13e-100, Item 8(a) (1992).

has no belief whatsoever is insufficient.⁴⁷ Item 8(b), in turn, requires the issuer to "[d]iscuss in reasonable detail the material factors upon which" the belief concerning the fairness of the transaction was based and, "to the extent practicable, the weight assigned to each such factor."⁴⁸ Conclusory statements are not sufficient, and the factors normally included in such a discussion are quite complex.⁴⁹ Allegedly misleading disclosure under Items 7, 8, and 9 formed the basis of the Howing shareholders' claim.⁵⁰

B. *The Howing Cases*

Originally incorporated as Services Insurance Agency in 1947, Nationwide Corporation became associated with the Nationwide Insurance Companies in 1955 and, at that time, assumed its present name. Through continual growth Nationwide became one of the largest insurance companies in the United States,⁵¹ with subsidiaries engaged in the life insurance, accident and health insurance, and annuity businesses.⁵² In order to link Nationwide Corporation to the other members of the Nationwide insurance group, a special class of stock (Class B) was issued to only two other Nationwide companies: Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company. The Class A shares were held by the public.⁵³ The voting rights of Nationwide Corporation were structured so that as long as the Class B shares were not less than forty percent of the total shares outstanding, the Class B Shareholders would hold one-half of the voting power. This arrangement assured Nationwide Mutual and Nationwide Mutual Fire of effective control of Nationwide Corporation.⁵⁴

⁴⁷ *Id.* § 240.13e-100, Item 8(a), Instruction.

⁴⁸ *Id.* § 240.13e-100, Item 8(b).

⁴⁹ *Id.* § 240.13e-100, Item 8(b), Instructions. The instructions to Item 8(b) state that the relevant factors will normally include current market prices, historical market value, net book value, going concern value, and liquidation value of the company. *Id.* As well, the factors normally relevant under 8(b) include Item 8(c)-(e) concerning the degree of participation by the minority shareholders and the minority directors in the transaction. *See id.*

⁵⁰ *See infra* notes 51-68 and accompanying text (discussing the factual history behind the *Howing* cases).

⁵¹ *Howing I*, 826 F.2d 1470, 1471 (6th Cir. 1987).

⁵² *Efros v. Nationwide Corp.*, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,077, at 95,117 (S.D. Ohio 1983).

⁵³ *Howing I*, 826 F.2d at 1471.

⁵⁴ *Id.* at 1472.

In 1978, Nationwide Mutual and Nationwide Mutual Fire began to eliminate public ownership of Nationwide Corporation by making a tender offer for the Class A stock that resulted in the acquisition of 4,074,695 shares.⁵⁵ Nationwide Mutual and Nationwide Mutual Fire continued to purchase the Class A shares in the open market until 1982, at which time the two companies owned 85.6% of the Class A stock outstanding.⁵⁶ In September of that year, Nationwide Mutual informally proposed a merger between itself and Nationwide Corporation.⁵⁷ On November 2, 1982, Nationwide Corporation's independent directors,⁵⁸ representing the interests of the public stockholders of Nationwide Corporation, met with representatives of the First Boston Corporation, an investment banking company⁵⁹ that had determined that \$42.50 per share was a fair price for the stock. The independent directors decided in favor of the merger,⁶⁰ and the next day Nationwide Corporation's Board of Directors unanimously voted for the merger. Proxy solicitations were mailed in December to the approximately 4,000 shareholders, informing them of the proposed merger, asking for their support, and announcing that the shareholders would vote on whether to pursue the merger on January 18, 1983.⁶¹

Belle Efros, a holder of only 51 shares,⁶² took the first legal action against the merger by seeking an injunction to prevent the January 18 meeting. Her only recourse was to stop the meeting because, if the meeting occurred, the number of shares possessed by Nationwide Mutual and Nationwide Mutual Fire assured the merger's approval. She failed,

⁵⁵ *Id.* The tender offer was for twenty dollars per share. *Id.*

⁵⁶ *Id.* The prices at which they purchased in the market ranged from \$22.50 to \$24.64. *Id.*

⁵⁷ *Howing Co. v. Nationwide Corp.*, 625 F. Supp. 146, 148 (S.D. Ohio 1985) (quoting Nationwide Corporation's proxy statement of December 9, 1982).

⁵⁸ These directors were five Class A shareholders who were neither employees of Nationwide nor directors, employees or officers of Nationwide Mutual or Nationwide Mutual Fire. *Id.* at 149. Experts have advocated the use of independent directors in order to ensure the adequate representation of minority shareholders in mergers. See *Guidelines on Going Private*, *supra* note 3, at 327.

⁵⁹ *Efros v. Nationwide Corp.*, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,077, at 95,118 (S.D. Ohio 1983).

⁶⁰ The independent directors retained the right to cancel the merger "on behalf of Nationwide's Board of Directors" if First Boston withdrew its opinion on the fairness of the price, a majority of the publicly held shares voted against the merger, or another party made a better offer. *Id.*

⁶¹ *Howing Co.*, 625 F. Supp. at 150.

⁶² *Efros*, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 95,118. At this stage of the litigation, the claim was based on 14a-9 alone. *Id.* at 95,119.

however, in that the injunction was denied,⁶³ and the shareholders approved the merger by the vote of 94.7% of the shares.⁶⁴ Ms. Efros's action was later consolidated with an action brought by the Howing Company and Douglas McLellan, two Wall Street veterans.⁶⁵ The combined case, in which the plaintiffs claimed a violation of Items 7, 8, and 9 of Schedule 13E-3,⁶⁶ reached the district court in 1985.⁶⁷ The district court dismissed their case on summary judgment, and McLellan and Howing appealed; Ms. Efros did not.⁶⁸

The Sixth Circuit heard Howing's case for the first time in early October of 1986 (*Howing I*)⁶⁹ and released its decision almost a year later. As a result of its decision in *Howing I*, the Sixth Circuit became the first court of appeals in the nation to recognize an implied private right of action under section 13(e).⁷⁰ While the court realized that other federal courts were reluctant to imply private rights of action, it believed that the factors favoring recognition under section 13(e) so dominated all others that recognition was justified in this case.⁷¹ Principal among these

⁶³ *Id.* at 95,121. In a remarkably prescient comment foreseeing the controversy in *Howing III*, District Judge Rubin observed:

Although it might be argued that any omission or misrepresentation in the proxy materials is irrelevant for purposes of injunctive relief, since Nationwide Mutual has sufficient votes to approve the merger on its own, we decline to adopt such a position. . . . [W]e conclude that there is a sufficient causal relationship between the proxy materials and the merger to proceed with our inquiry.

Id. at 95,119.

⁶⁴ *Howing I*, 826 F.2d 1470, 1472 (6th Cir. 1987).

⁶⁵ *Id.* The Howing Company and Mr. McLellan are somewhat less sympathetic plaintiffs than Belle Efros. The Howing Company is a New York partnership that was managed by a Mr. Hirsch, who had controlled industrial and commercial real estate for thirty years. Douglas McLellan was an attorney who had previously been a vice president of an investment bank and an investment advisor at a securities firm. One commentator noted on the result of *Howing I* that "[i]t is a pity that the Howing court ignored McLellan's and Hirsch's sophistication and expertise in financial and securities matters as it rushed to allow them the protection of Section 13(e)." Kofele-Kale, *supra* note 31, at 645.

⁶⁶ See Kofele-Kale, *supra* note 31, at 669-70 (discussing disclosure obligations under Items 7, 8, and 9 of Schedule 13E-3). Plaintiffs also pursued a state law claim for breach of fiduciary duty. *Efros*, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 95,120.

⁶⁷ *Howing Co. v. Nationwide Corp.*, 625 F. Supp. 146 (S.D. Ohio 1985).

⁶⁸ *Howing III*, 972 F.2d 700, 702 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1645 (1993).

⁶⁹ *Howing I*, 826 F.2d 1470, 1470 (6th Cir. 1987).

⁷⁰ *Id.* at 1474. The court noted that the district court avoided the issue by assuming that a private right of action for § 13(e) existed. *Id.*

⁷¹ See *id.* at 1474-76.

factors was that the drafting of section 13(e), which had been modeled after section 14(a),⁷² occurred soon after the Supreme Court implied a private right of action under 14(a) in *J.I. Case v. Borak*.⁷³

After finding an implied private right of action under section 13(e), the Sixth Circuit addressed the more complex question of whether Nationwide had violated Rule 13e-3.⁷⁴ The gravamen of this question was whether Nationwide had followed the provisions of Schedule 13E-3.⁷⁵ While admitting that a summary of the items required by Schedule 13E-3 is usually sufficient, the court distinguished Items 7, 8, and 9 in that the very "rationale behind complete disclosure . . . [was] that they go to the essence of the transaction."⁷⁶ However, the court found that Nationwide had met the dictates of both Item 7, requiring disclosure of the reasons for the merger and for its form,⁷⁷ and Item 9, requiring disclosure of the contributions of outside parties.⁷⁸

The problem was Nationwide's degree of compliance with Item 8.⁷⁹ Nationwide's proxy statement had noted that the offered price of \$42.50 per share represented a premium over market price.⁸⁰ In fact, immediately before the announcement of the plans for the merger on November 3, Nationwide's stock had traded for \$28 per share. Because the offered price represented a 51.8% premium over market, was 12.1

⁷² See *supra* notes 4 and 25 (discussing the legislative history behind § 13(e) and Rule 13e-3).

⁷³ *Howing I*, 826 F.2d at 1475. Section 13(e) was adopted in 1967, three years after the Court's decision in *J.I. Case v. Borak*, 377 U.S. 426 (1964). The argument for implying a private right of action is that when Congress modeled § 13(e) after § 14(a) it knew that the Court had implied a private right of action under § 14(a). Thus, Congress must have expected the courts to imply a private right of action under § 13(e) as well. See *Howing I*, 826 F.2d at 1475.

⁷⁴ See *Howing I*, 826 F.2d at 1476-79.

⁷⁵ See *supra* notes 38-49 and accompanying text (outlining some of the requirements under Schedule 13E-3).

⁷⁶ *Howing I*, 826 F.2d at 1477.

⁷⁷ *Id.* The district court noted four business purposes of the merger: (1) the elimination of the potential for conflicts of interests resulting from Nationwide's increasing connections with the Nationwide group of insurance companies; (2) additional flexibility for management; (3) greater efficiency due to the merger of the management structures of Nationwide Corporation and Nationwide Mutual; and (4) the elimination of the costs associated with the SEC requirements for publicly traded corporations. *Howing Co. v. Nationwide Corp.*, 625 F. Supp. 146, 152 (S.D. Ohio 1985).

⁷⁸ *Howing I*, 826 F.2d at 1479.

⁷⁹ See *supra* notes 46-49 and accompanying text (describing the requirements under Item 8).

⁸⁰ *Howing I*, 826 F.2d at 1483 (Guy, J., dissenting) (quoting Nationwide's proxy statement of December 9, 1982).

times Nationwide's previous year's earnings per share of \$3.51, and was 106% of per share book value,⁸¹ Nationwide contended that it had made full disclosure.⁸²

Noting Schedule 13E-3's declaration that mere "conclusory statements" are not enough,⁸³ the Sixth Circuit stated that "if any of the sources of value indicate a value higher than the value of the consideration offered to unaffiliated security holders,"⁸⁴ such sources should be addressed in the proxy statement. The court expressed concern that Nationwide had failed to address factors⁸⁵ other than the ones favorable to it and had failed to assign weights to any of the factors.⁸⁶ The Sixth Circuit remanded the case to the district court for a finding on the materiality of the omissions from Item 8's requirements and for further consideration of state law claims of breach of fiduciary duty.⁸⁷

Although the conflict might have been resolved had the district court allowed the case to go to the jury, the district court, instead, granted summary judgment for the defendant on the issue of materiality.⁸⁸ Thus,

⁸¹ *Howing Co.*, 625 F. Supp. at 150.

⁸² *Id.*

⁸³ *Howing I*, 826 F.2d at 1478.

⁸⁴ *Id.* (quoting Exchange Act Release No. 34-17719, 3 Fed. Sec. L. Rep. (CCH) ¶ 23,709, at 17,245-28 (Apr. 13, 1981)).

⁸⁵ When it next heard the case in 1991, the court addressed the specific factors that Nationwide should have included in its proxy statement. One factor was that insurance companies usually sell at three to four times book value, rather than the 1.025 multiplier produced by the \$42.50 price. See *Howing Co. v. Nationwide Corp.*, 927 F.2d 263, 266-67 (6th Cir. 1991) [hereinafter *Howing II*].

⁸⁶ *Howing I*, 826 F.2d at 1478. Even though Item 8 only requires the weighing of the factors "to the extent practicable," see 17 C.F.R. § 240.13e-100, Item 8(b), Instructions (1992), the court's concern seems to be valid. The Nationwide proxy statement had read:

Although the Evaluation Committee did not give specific weight to each of the various factors considered in evaluating the fairness of the proposed merger, particular emphasis was placed upon the receipt of the opinion of First Boston.

Howing I, 826 F.2d at 1479. Practicalities do not require Nationwide to abrogate its responsibilities. The court quotes First Boston's entire opinion letter, which is filled with conclusory statements noting that First Boston considered numerous factors including, but not limited to, the "historical financial record, operating statistics, [and] current financial position" of Nationwide. *Id.* at 1485. While every shareholder received a copy of that letter, the letter merely listed different factors without explaining each factor's significance. The Sixth Circuit clearly envisions a much more detailed analysis than that which Nationwide gave.

⁸⁷ *Howing I*, 826 F.2d at 1481.

⁸⁸ *Howing Co. v. Nationwide Corp.*, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,858, at 94,656 (S.D. Ohio 1989). The standard for judging materiality is that

the litigants found themselves arguing before the Sixth Circuit again late in 1990 (*Howing II*).⁸⁹ In its opinion, released in 1991, the court again overturned the district court and ruled that, because of the financial interests at stake in Rule 13e-3 transactions,⁹⁰ omissions from Item 8 are presumptively material.⁹¹ The court concluded that summary judgment was not proper because the defendant had not sufficiently rebutted this presumption.⁹²

Whether the district court would have let the case go to the jury at last, we shall never know. The Supreme Court granted certiorari, vacated the judgment of *Howing II* and remanded the case for the Sixth Circuit⁹³ to reconsider in light of the Supreme Court's intervening ruling in *Virginia Bankshares, Inc. v. Sandberg*.⁹⁴

II. CAUSATION OF HARM: SOMETHING LESS THAN CAUSE IN FACT

Of the two principal holdings in *Virginia Bankshares*,⁹⁵ the Sixth Circuit correctly perceived⁹⁶ the relevant ruling to be that a member of a class of minority shareholders whose votes were not required to authorize the corporate action subject to the proxy solicitation could not show causation of damages from inadequate disclosure;⁹⁷ this ruling

"[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

⁸⁹ 927 F.2d 263 (6th Cir. 1991).

⁹⁰ See *supra* note 3 (describing freeze-out mergers); *supra* notes 32-37 and accompanying text (describing the application of § 13(e) to freeze-out mergers).

⁹¹ See *Howing II*, 927 F.2d at 265. The court found that the specificity of the requirements in Item 8 created the presumption. *Id.*; see *supra* notes 46-49 and accompanying text (describing Item 8 requirements).

⁹² *Howing II*, 927 F.2d at 269-70.

⁹³ *Nationwide Corp. v. Howing Co.*, 112 S. Ct. 39 (1991).

⁹⁴ 111 S. Ct. 2749 (1991).

⁹⁵ *Howing III*, 972 F.2d 700, 704 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1645 (1993). The holding in *Virginia Bankshares* that was not relevant to the issue in *Howing* concerned materiality. In *Virginia Bankshares*, the Supreme Court held that "knowingly false statements of reasons may be [material] even though conclusory in form." 111 S. Ct. at 2755. The Sixth Circuit had ruled basic information about the value of shares in a company (book, going concern and liquidation values) presumptively material in *Howing II*. *Howing II*, 927 F.2d 263, 266 (6th Cir. 1991). The information held material in *Howing II*, however, was not statements of reasons. Consequently, the materiality holding of *Virginia Bankshares* was not relevant.

⁹⁶ See *Howing III*, 972 F.2d at 704.

⁹⁷ See *Virginia Bankshares*, 111 S. Ct. at 2766.

went to the heart of the *Howing* plaintiffs' claim. From the very beginning, Nationwide Mutual and Nationwide Mutual Fire had sufficient votes to effect the merger. If the Supreme Court's decision was absolute, then the preceding ten years of litigation had been a waste. In ruling that the plaintiffs' claim was still viable, the Sixth Circuit narrowly interpreted *Virginia Bankshares* and considered questions that had been debated for a quarter of a century.

The seminal case on causation of damages in this context is *Mills v. Electric Auto-Lite Co.*⁹⁸ In *Mills*, minority shareholders of Auto-Lite sued to set aside Auto-Lite's merger with its majority and controlling stockholder, Mergenthaler Linotype Company. The plaintiffs claimed that the merger occurred because Auto-Lite violated Rule 14a-9 by issuing a materially misleading proxy statement which carried its directors' recommendation of the merger but did not mention that all eleven of them were Mergenthaler appointees.⁹⁹ Finding that Mergenthaler owned and controlled approximately 54% of Auto-Lite's shares, the Court noted that a two-thirds majority of the shares was needed for approval of the merger.¹⁰⁰ Consequently, the proxies obtained through the proxy statement had provided the votes needed for the merger to occur.

The lower courts in *Mills* had encountered difficulty on the question of causation.¹⁰¹ Under traditional concepts of liability, in order to claim damages for a misrepresentation, one had to show that but for the misrepresentation the damages would not have occurred. In other words, the misrepresentation had to be the sine qua non or cause in fact of the damages.¹⁰² However, when damages are claimed to have arisen from a proxy solicitation, proving cause in fact can be quite problematic. Proof of the cause in fact was the difficulty encountered by the plaintiffs in *Mills*.¹⁰³

Before the shareholders' meeting on the merger, Auto-Lite had obtained 317,000 votes through its proxy solicitation.¹⁰⁴ The court of appeals concluded that to determine whether the thousands of people who gave proxies would have done so had they known that the directors were

⁹⁸ 396 U.S. 375 (1970).

⁹⁹ *Id.* at 378.

¹⁰⁰ *Id.* at 379.

¹⁰¹ See *Mills v. Electric Auto-Lite Co.*, 403 F.2d 429, 435-36 (7th Cir. 1968); *Mills v. Electric Auto-Lite Co.*, 281 F. Supp. 826, 829-30 (N.D. Ill. 1967).

¹⁰² For a general discussion of the tort of misrepresentation, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 106-109 (5th ed. 1984). For a discussion of causation in fact, see *id.* § 41.

¹⁰³ *Mills*, 396 U.S. at 380.

¹⁰⁴ *Id.* at 379.

scarcely disinterested was an impossible task. Therefore, it held that if the defendants could show that the terms of the merger were fair to the minority shareholders, then the trial court could conclude that the proxies would have been given even if the misrepresentation had not occurred.¹⁰⁵ Conversely, if the terms of the merger could not be shown to be fair, then the trial court could conclude that the claim possessed the requisite cause in fact.¹⁰⁶

Justice Harlan, writing for the Court, recognized that the appellate court's approach would often make compliance with Rule 14a-9 unnecessary.¹⁰⁷ Equally, the Court recognized the inherent difficulty in actions based upon inadequate disclosure in proxy solicitations of proving cause in fact; thus, the Court opted for an entirely different avenue. Finding that there was no need to prove that "the defect actually had a decisive effect on the voting,"¹⁰⁸ the Court held:

Where there has been a finding of materiality,¹⁰⁹ a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction.¹¹⁰

In other words, once a court had found that the inadequacy in the proxy statement was material,¹¹¹ causation would turn on whether the proxy solicitation was an "essential link" in completing the transaction, rather than on a showing of reliance on the part of the voting shareholders. This "essential link" formulation obviates the need to prove cause in fact by effectively reducing a plaintiff's burden to a showing that the violation

¹⁰⁵ See *id.* at 380.

¹⁰⁶ *Mills v. Electric Auto-Lite Co.*, 403 F.2d 429, 436 (7th Cir. 1968).

¹⁰⁷ Once the shareholders' meeting was held and the merger approved, the lack of full disclosure would become irrelevant. The corporation could then escape liability to the shareholders by showing that the terms of the merger were fair. Such an approach would discount the value of the shareholders' judgment, *id.* at 381, and frustrate the congressional policy behind the disclosure rules. *Id.* at 383.

¹⁰⁸ *Id.* at 385.

¹⁰⁹ The Court believed that when an omission in a proxy statement had been shown to be "material," much of the purpose in requiring proof of causation had already been accomplished. The materiality requirement would ensure that the omission had a "significant propensity to affect the voting process," and thus eliminate trivial claims. *Id.* at 384.

¹¹⁰ *Id.* at 385.

¹¹¹ For the general standard of materiality, see *supra* note 88.

occurred in a context such that it might have been the cause in fact of the plaintiff's injury. The Court also stressed that the "essential link" formulation furthers the policy behind the disclosure rules, which values informed shareholders, by "resolving doubts in favor of those the statute is designed to protect."¹¹²

The Supreme Court recognized in *Mills* that a plaintiff in a 14a-9 action must establish that a violation of the rule caused his injury. The plaintiff could satisfy this requirement by showing that the proxy solicitation was an "essential link in the accomplishment of the transaction" for which the proxy was sought.¹¹³ Thus, where the faction seeking such a transaction initially lacked the requisite number of votes, proof of a material misstatement or omission in a proxy statement made the showing of the causal connection between the proxy statement and a shareholder's injury fairly easy. In order to meet his burden of showing that the proxy solicitation was the "essential link," an injured shareholder would simply have to present evidence of the faction's insufficient number of votes. The Court expressly acknowledged, however, that it was not deciding "whether causation could be shown where the management controls a sufficient number of shares to approve the transaction without any votes from the minority."¹¹⁴

Therefore, at least one question that remained unanswered in the wake of *Mills* was under what circumstances a proxy solicitation could be an essential link in the accomplishment of the transaction where management had control. In *Schlick v. Penn-Dixie Cement Corp.*,¹¹⁵ the Second Circuit found that had the defendants complied with Rules 10b-5 and 14a-9 and made full disclosure, the plaintiffs would have had enough information to launch or threaten to launch a damaging public relations campaign that would have stopped the merger. Consequently, the defendants' violations of 10b-5 and 14a-9 allowed the merger to be completed by depriving the plaintiffs of the opportunity to take advantage of this nonlegal remedy.¹¹⁶ Although *Schlick*

¹¹² *Mills*, 396 U.S. at 385.

¹¹³ See *id.* at 385.

¹¹⁴ *Id.* at 385 n.7.

¹¹⁵ 507 F.2d 374 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975). *Schlick* concerned a merger involving Continental Steel Corporation, in which the defendant was a majority and controlling stockholder. The plaintiffs contended that the defendant had forced Continental into a merger agreement with an exchange ratio based upon the "manipulated and artificial stock values of the merging parties." *Id.* at 376. The alleged defect in the proxy statement, which was issued in connection with the merger, was that it did not "disclose the manner in which Penn-Dixie had inflated the value of its shares at the expense of Continental." *Id.* at 377.

¹¹⁶ See *id.* at 384. The court noted: "We cannot assume that even a rapacious controlling management would necessarily want to hang its dirty linen out on the line and

only addressed available nonlegal remedies, in the case of a merger preceded by a proxy solicitation, one could also argue that inadequate disclosure in the proxy statement so deceived the minority shareholders that they failed to take advantage of available legal remedies.¹¹⁷ The essential link would be that had they sought those legal remedies, the transaction would not have occurred. For example, the most obvious remedy would be an injunction preventing the holding of the shareholders' meeting or the voting of the proxies. Also, a sufficiently large number of minority shareholders might decide to seek a state appraisal remedy such that the company involved would not have the cash resources to complete the merger.¹¹⁸

A more subtle side of *Mills'* unanswered question involves whether there might be a way to show a "causal relationship between the violation and the [shareholder's] injury" without showing that "the proxy solicitation . . . was an essential link in the accomplishment of the transaction."¹¹⁹ In other words, the issue is whether the court may find that the misleading proxy statement caused an injury even if it was not "essential" to the transaction. In a situation where one party has control, the deception of the shareholders may have no effect on the ultimate outcome. Nevertheless, if some of the shareholders neglect to seek and thus lose a state law appraisal remedy, they have still suffered harm.¹²⁰ The Seventh Circuit, in *Swanson v. American Consumer Industries, Inc.*,¹²¹ dealt with such a situation. The court held that a shareholder

thereby expose itself to suit or Securities Commission or other action—in terms of reputation and future takeovers." *Id.*; see also Note, *Causation and Liability in Private Actions for Proxy Violations*, 80 YALE L.J. 107, 117 (1970) ("Although the combined vote of all the minority shareholders would not be enough to stop the transaction, the unfavorable publicity ensuing from the revelation . . . might [deter] management from concluding the transaction for fear of damage to its reputation, credit standing, or business image."). This theory in *Schlick* is similar to the theory that the Supreme Court rejected in *Virginia Bankshares*. See *infra* notes 139-49 and accompanying text (discussing *Virginia Bankshares'* analysis of this issue).

¹¹⁷ See Note, *supra* note 116, at 118-20.

¹¹⁸ *Id.*

¹¹⁹ See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 385 (1970).

¹²⁰ See Note, *supra* note 116, at 125.

¹²¹ 475 F.2d 516 (7th Cir. 1973). Plaintiffs were stockholders of Peoria Service Company who challenged the sale of that corporation's assets to a company controlled by American Consumer Industries ("ACI"). Through its subsidiary, ACI controlled 87% of Peoria's stock. Regardless of ACI's degree of control, the plaintiffs claimed that the sale had been accomplished by means of materially misleading proxy materials which violated Rule 10b-5. *Id.* at 517. The court saw no causal connection between the proxy solicitation and the merger. *Id.* at 518.

who had failed to seek appraisal after receiving a materially misleading proxy solicitation had proven a causal connection between the violation of Rule 10b-5 and his injury.¹²² The party violating the rule was then liable for damages.

Another case, important not so much for establishing a causation theory under an implied private cause of action as for limiting one, is *Blue Chip Stamps v. Manor Drug Stores*.¹²³ As part of the resolution of an antitrust suit, Blue Chip Stamps was ordered to offer stock to many of the retailers who had previously used its stamp service. Although a price had been set which was favorable to the buyers, only slightly more than half of the shares offered were purchased. Manor Drug Stores and others who neglected to buy some or all of the shares that Blue Chip Stamps had offered to them sued claiming that Blue Chip Stamps had violated Rule 10b-5.¹²⁴ Specifically, the potential buyers claimed that Blue Chip Stamps' offering prospectus was "materially misleading in its overly pessimistic appraisal of Blue Chip's status and future prospects."¹²⁵ As a result, they demanded the money that they would have made had they bought the shares at the offered price.¹²⁶

Blue Chip Stamps presented the Supreme Court with the question of whether a person who had neither purchased nor sold securities could maintain an action for a violation of 10b-5.¹²⁷ Justice Rehnquist's majority opinion is replete with concerns that emanate from the observation that the recovery sought by such a person would be one "largely conjectural and speculative . . . in which the number of shares involved will depend on the plaintiff's subjective hypothesis."¹²⁸ Among those concerns were: that suits would be filed solely for their "settlement

¹²² This holding can be derived through a reading of a somewhat cryptic portion of *Swanson*. The court began by noting that the causal connection between the proxy statement and the sale rested on "an entirely different footing" than that between the proxy statement and another injury, *id.* at 520, and that, after *Mills*, causation and reliance were no longer "factually-to-be-proven" predicates to recovery. *Id.* The court then reasoned that the "obligation to disclose and [the] withholding of a material fact" established causation. *Id.* at 521 (quoting *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 154 (1972)). Finally, the court concluded "it is inescapable that plaintiff shareholders have proven all the elements required to impress liability on defendants under Section 10(b) of the Securities and Exchange Act and the Commission's Rule 10b-5 for loss of their informed ability to exercise their statutory appraisal rights." *Id.*

¹²³ 421 U.S. 723 (1975).

¹²⁴ *Id.* at 726-27.

¹²⁵ *Id.* at 726.

¹²⁶ *Id.* at 727.

¹²⁷ *Id.* at 725; see *supra* note 23 (text of Rule 10b-5).

¹²⁸ *Blue Chip Stamps*, 421 U.S. at 734-35.

value,"¹²⁹ that parties would abuse the discovery process,¹³⁰ and that courts would have to determine "many rather hazy issues of historical fact the proof of which depended almost entirely on oral testimony."¹³¹

The central theme of *Blue Chip Stamps* is that judicial interpretation of a right of action must be much more cautious when the right of action involved is implied rather than express. Rehnquist opined that the private right under Rule 10b-5 was "a judicial oak which has grown from little more than a legislative acorn."¹³² Rather than meaning to imply by this statement that the right was not supported by congressional intent, Rehnquist simply meant that there was no congressional guidance concerning its "contours."¹³³ Therefore, the right of action had to be "judicially delimited . . . unless and until Congress address[ed] the question."¹³⁴ In shaping the contours of the right, the Court looked to certain "policy considerations."¹³⁵ Noting its concern about cases turning on speculative issues, the Court held that those who had neither bought nor purchased securities could not maintain a cause of action under Rule 10b-5.¹³⁶

While the question involved in *Virginia Bankshares, Inc. v. Sandberg*¹³⁷ was the question left unanswered in *Mills*,¹³⁸ the soul of *Virginia Bankshares* derives from *Blue Chip Stamps*. Specifically, the issue presented in *Virginia Bankshares* was whether a member of a class of minority shareholders whose votes were not needed to approve a merger between First American Bank of Virginia and Virginia Bankshares could show "causation of damages compensable under § 14(a)."¹³⁹ After

¹²⁹ *Id.* at 740.

¹³⁰ "[T]o the extent that [discovery] permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit." *Id.* at 741.

¹³¹ *Id.* at 743.

¹³² *Id.* at 737.

¹³³ *Id.* at 749.

¹³⁴ *Id.*

¹³⁵ *Id.* at 737.

¹³⁶ *Id.*

¹³⁷ 111 S. Ct. 2749 (1991). An excellent analysis of the *Virginia Bankshares* opinion is contained in Eric G. Orlinsky, Note, *Virginia Bankshares, Inc. v. Sandberg: The Golden Rule of Section 14(a)*, 47 BUS. LAW. 837 (1992). An additional analysis can be found in Charles David Elliott, Note, *Virginia Bankshares, Inc. v. Sandberg: Change in a Minority Shareholder's Right to the Truth?*, 52 LA. L. REV. 1045 (1992).

¹³⁸ See *supra* text accompanying note 114 (discussing the remaining issue in light of the *Mills* decision).

¹³⁹ *Virginia Bankshares*, 111 S. Ct. at 2755. Sandberg and the other plaintiffs were

discussing implied private rights of action and the primacy of congressional intent,¹⁴⁰ the Court observed that there were great obstacles to finding congressional intent in the midst of silence. However, since freezing the contours of a private right "would be demonstrably inequitable to a class of would-be plaintiffs with claims comparable to those previously recognized,"¹⁴¹ the Court believed that the plaintiffs' claim warranted consideration. The Court's guide in deciding whether a remedy existed was *Blue Chip Stamps* and the policy concerns that it addressed.¹⁴²

The respondents argued that the proxy statement requesting their vote in favor of the merger was an essential link in the accomplishment of that transaction¹⁴³ in that the parties behind the merger would have been "unwilling to proceed without the approval" of the minority shareholders.¹⁴⁴ The minority's approval had only been obtained by means of a materially misleading statement which had violated Rule 14a-9. The respondents claimed that they were entitled to the full amount that they would have received had the proxy statement complied with 14a-9.¹⁴⁵ Finding that the "same threats of speculative claims and procedural intractability" were present in Sandberg's theory as existed in *Blue Chip Stamps*, Justice Souter unleashed against Sandberg's theory the full force of the Court's fear of "'hazy' issues inviting self-serving testimony, strike-suits, and protracted discovery."¹⁴⁶ In the terms of *Mills*, "the causal connection would depend on a desire to avoid bad shareholder or public relations, and the essential character of the causal link would stem not from the enforceable terms of the parties' corporate relationship, but from one party's apprehension of the ill will of the other."¹⁴⁷ As a result, "[r]eliable evidence would seldom exist."¹⁴⁸ "Given

shareholders of First American Bank of Virginia. First American Bankshares, Inc. owned eighty-five percent of First American Bank and the public owned the remaining fifteen percent. First American Bankshares merged First American Bank into its subsidiary, Virginia Bankshares, in a freeze-out merger. *Id.*; see *supra* note 3 (discussing "freezeout" mergers).

¹⁴⁰ *Virginia Bankshares*, 111 S. Ct. at 2763-64.

¹⁴¹ *Id.* at 2764.

¹⁴² See *id.*

¹⁴³ *Id.* at 2762. The shareholders phrased their argument in terms of the often quoted language from *Mills*. *Id.*

¹⁴⁴ *Id.* This theory is similar to that of *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975). See *supra* notes 115-18 and accompanying text (discussing *Schlick*).

¹⁴⁵ *Virginia Bankshares*, 111 S. Ct. at 2756.

¹⁴⁶ *Id.* at 2765; see *supra* notes 127-31 and accompanying text (discussing policy concerns associated with the *Blue Chip Stamps* decision).

¹⁴⁷ *Virginia Bankshares*, 111 S. Ct. at 2762.

¹⁴⁸ *Id.* at 2765. The Court articulated some of its concerns:

a choice," wrote the Court, "we would reject any theory of causation that raised such prospects, and we reject this one."¹⁴⁹

As an additional theory of causation, the respondents in *Virginia Bankshares* claimed that the proxy statement was an essential link because approval by the majority of the minority shareholders insulated the merger from later attack under Virginia state law.¹⁵⁰ Rejecting this claim without considering the causation issue, the Court found that if the proxy statement had indeed been materially misleading, the merger would not in fact be insulated from challenge in the Virginia courts.¹⁵¹ Thus, the solution to the question of whether a lost state remedy could satisfy the *Mills* causation requirement would have to wait for another case.

III. THE SIXTH CIRCUIT'S "SOLUTION"

Just as *Howing I* saw the Sixth Circuit adventurously become the first court of appeals to find an implied private right of action in section 13(e) after years of judicial reluctance to imply rights of action,¹⁵² *Howing III* shows the Sixth Circuit at its boldest.¹⁵³ That the Supreme Court vacated the judgment of *Howing II* and remanded the case for reconsideration in light of *Virginia Bankshares* strongly intimated that there was no need for any further consideration of the *Howing* plaintiffs' claim.¹⁵⁴ Yet, rather than dismissing their claim, the Sixth Circuit

A subsequently dissatisfied minority shareholder would have virtual license to allege that managerial timidity would have doomed corporate action but for the ostensible approval induced by the misleading statement, and opposing claims of hypothetical diffidence and hypothetical boldness on the part of directors would probably provide enough depositions in the usual case to preclude any judicial resolution short of the credibility judgments that can only come after trial.

Id.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 2762. Without minority approval the merger would have been voidable due to a conflict of interest on the part of one of the bank's directors.

¹⁵¹ *Id.* at 2766 n.14. This was true only because Virginia statutes did not allow for an appraisal remedy in bank mergers. *Id.*

¹⁵² See *supra* text accompanying notes 25-31 (discussing a private right of action under § 13(e)).

¹⁵³ All three of the Sixth Circuit's *Howing* cases were heard by three-judge panels. Judges Merritt, Guy and Norris heard *Howing I*, 826 F.2d 1470 (6th Cir. 1987), while *Howing II*, 927 F.2d 263 (6th Cir. 1991), and *Howing III*, 972 F.2d 700 (6th Cir. 1992), were heard before Judges Merritt, Guy and Brown. Judge Guy dissented in all three cases.

¹⁵⁴ Very little was ever said about a lost state remedy in any of the *Howing* cases. At most, some of the early cases had mentioned that the plaintiffs had not exercised their

became the first post-*Virginia Bankshares* court to rule directly on the lost state remedy theory of causation.¹⁵⁵

After briefly noting that *Virginia Bankshares* left open the question of whether a member of a class of shareholders whose votes were not needed to authorize a merger could show causation by way of a lost state remedy,¹⁵⁶ the Sixth Circuit quickly penetrated *Virginia Bankshares'* analytical framework. Although it was unable to "derive a general standard of causation from *Virginia Bankshares*,"¹⁵⁷ the court did apply *Virginia Bankshares'* analysis and observed that the Supreme Court had identified "policy reasons" as the tool with which to define the scope of implied private rights of action.¹⁵⁸ For the Sixth Circuit, the preeminent sources containing these policy reasons were the opinions in *Mills* and *Virginia Bankshares*. The Sixth Circuit viewed the latter as a warning to beware of "speculative claims and procedural intractability."¹⁵⁹ Conversely, it saw the former as an exhortation to "avoid the impracticalities" of requiring proof of precise causal relations while acting

state appraisal rights. See *Howing I*, 826 F.2d 1470, 1472 (6th Cir. 1987); *Howing Co. v. Nationwide Corp.*, 625 F. Supp. 146, 150 (S.D. Ohio 1985).

¹⁵⁵ The District of Columbia Circuit and the Third Circuit have both applied the *Virginia Bankshares* causation holding and made rather far-reaching statements about its effects, but in neither case was the issue of a lost state remedy present. See *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 425 (D.C. Cir. 1992) (holding that shareholders have a private right of action under § 14(a) to seek injunctive relief when management refuses to include shareholder proposals in proxy materials); *Scattergood v. Perelman*, 945 F.2d 618, 624 (3d Cir. 1991) ("Because the Supreme Court has held that, when a majority shareholder of a company pursues a freeze-out merger, the chain of causation between a pre-merger misrepresentation and the price received under the merger is broken, we will affirm the judgment of the district court with respect to these claims."). Indeed, the Third Circuit acknowledged that it was not deciding on a lost state injunction remedy. *Scattergood*, 945 F.2d at 626 n.4. The District Court for the Northern District of New York has issued a holding that involved the lost state remedy theory (in this case an appraisal remedy), but only to the extent of noting that *Virginia Bankshares* did not conclusively reject the theory. Believing that a lost state remedy theory might be valid, the court denied a motion to reconsider the judgment of an earlier case. See *Wilson v. Great Am. Indus., Inc.*, 770 F. Supp. 85, 91 (N.D.N.Y. 1991), *aff'd in part, rev'd in part*, 979 F.2d 924 (2d Cir. 1992) ("*Virginia Bankshares* expressly left open the question whether shareholders who may have forfeited state law rights in approving a corporate transaction might still have a cause of action under section 14(a).").

¹⁵⁶ *Howing III*, 972 F.2d 700, 704 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1645 (1993). Justice Souter explicitly wrote, "This case does not . . . require us to decide whether § 14(a) provides a cause of action for lost state remedies." *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2766 (1991).

¹⁵⁷ *Howing III*, 972 F.2d at 706-07.

¹⁵⁸ *Id.* at 707.

¹⁵⁹ *Id.*

in the service of resolving doubts in favor of those the law in question was designed to protect.¹⁶⁰

The key to the plaintiffs maintaining their claims was an Ohio law allowing dissenting shareholders to seek the appraisal of their shares within ten days after the shareholders' meeting approving the merger.¹⁶¹ Their argument was that "the misleading proxy statement was an 'essential link' in their decisions not to pursue their appraisal remedies."¹⁶² Although the plaintiffs had also tried to claim that this theory presented no "dangers of speculation,"¹⁶³ the Sixth Circuit recognized that some dangers were present. The theory "requires an inference that, given full and fair disclosure, [the plaintiffs] would have (1) voted against the transaction or not voted, thus qualifying for the appraisal remedy; and (2) exercised their appraisal rights within the statutorily prescribed ten-day time limitation."¹⁶⁴ However, the court found the speculation in this instance to be "no greater than that involved in *Mills*."¹⁶⁵

According to the Sixth Circuit, the *Mills* holding had created a "conclusive presumption" concerning the outcome of a vote on a transaction if some minority votes are needed.¹⁶⁶ In *Mills*, the Court presumed that if a misstatement or omission in a proxy statement was shown to be "material," such misstatement or omission would have been considered by the reasonable shareholder in deciding how to vote on the transaction.¹⁶⁷ As well, the theory rejected in *Virginia Bankshares*¹⁶⁸

¹⁶⁰ *Id.*

¹⁶¹ OHIO REV. CODE ANN. § 1701.85 (Anderson Supp. 1991). Dissenting shareholders are those shareholders who object to a transaction that has been approved by a sufficient number of shareholders for the transaction to occur. Many states have statutes which allow shareholders who object to a transaction that would substantially change the character of their shares (such as a merger or a sale of substantially all of the corporations assets) to receive a judicially determined fair value for the shares. The process in which a court would decide that fair value is called an appraisal. See, e.g., REV. MODEL BUSINESS CORP. ACT § 13.02 (1984).

¹⁶² *Howing III*, 972 F.2d at 708. The plaintiffs' argument again tracked the often quoted language from *Mills*.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 707.

¹⁶⁷ *Mills v. Electric Auto-Lite*, 396 U.S. 375, 384 (1970).

¹⁶⁸ Specifically, *Virginia Bankshares* rejected the plaintiffs' claim of a misleading proxy because the plaintiff's votes were not necessary for approval of the transaction. See *supra* notes 143-45 and accompanying text (describing the plaintiffs' argument in *Virginia Bankshares*).

had also created a presumption. The *Virginia Bankshares* Court presumed that a showing by minority shareholders that, had they voted against the corporate transaction, the directors would not have approved the transaction was too speculative to ever be proven.¹⁶⁹ The difference between the two presumptions "lies in the power to act."¹⁷⁰ Like the *Mills* presumption, the court remarked (in language echoing *Virginia Bankshares*) that "the Plaintiffs' loss-of-state-law-remedy theory derives its causal link from the enforceable terms—including the right to appraisal—of the parties' corporate relationship."¹⁷¹ Since the court concluded that adopting the lost state remedy theory would resolve doubts in favor of the shareholders that section 13(e) was designed to protect and that the theory was not excessively speculative,¹⁷² the only question remaining was whether it was applicable to the facts of *Howing III*.

In his dissent, Judge Guy strenuously challenged the notion that the plaintiffs could rightly recover under a lost state remedy theory. Believing that the facts did not "demonstrate an induced forfeiture of the appraisal remedy," he pointed out the plaintiffs' admission that they never believed that the price offered for the stock was adequate.¹⁷³ Additionally, in the early stages of the suit, the plaintiffs' counsel had stated that they chose to pursue their claim in federal court rather than opting for state appraisal actions because they believed that the former route was "more economical."¹⁷⁴ For the majority, however, this was unpersuasive. The plaintiffs' "decisions with respect to appraisal might well have been different had they received the full and fair disclosure to which they were entitled."¹⁷⁵ In the language of *Mills*, the

¹⁶⁹ *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2765 (1991).

¹⁷⁰ *Howing III*, 972 F.2d at 708.

¹⁷¹ *Id.*

¹⁷² *See id.* at 708-09. The court noted four sources in support of its conclusion: First, three current members of the Supreme Court have indicated their support for the theory, while the remainder of the Court has not determined its merits. Second, if . . . minority shareholders without sufficient voting power were categorically unable to demonstrate causation, we believe the Court would have resolved *Virginia Bankshares* on that broader ground. Third, the element of speculation required by the Plaintiffs' theory is no greater than that required by the theory accepted by the Court in *Mills*. Finally, we would be hesitant to hold that Congress intended to provide the protection of an implied right of action, but that causation could never be established in those cases where the minority shareholders, lacking sufficient votes to block the transaction, had their greatest need for such protection.

Id. at 709.

¹⁷³ *Id.* at 711 (Guy, J., dissenting).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 710. Had the Supreme Court read the text of *Howing I* more closely it might

court explained that "where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship [if] . . . he proves that the proxy solicitation was an essential link in the chain of events that deprived him of his state-law remedy."¹⁷⁶ Therefore, the court held that the Howing Company and McLellan had met their burden of establishing causation.¹⁷⁷

IV. AN ANSWER

A. *What Virginia Bankshares Left Unresolved*

In his opinion in *Virginia Bankshares*, Justice Souter mentioned as examples of causation theories that the Court was not addressing those which concerned either a foregone appraisal right¹⁷⁸ or an unobtained injunction that would have halted the merger.¹⁷⁹ In so doing, he was essentially incorporating the two basic paths by which a plaintiff might prove harm from a violation of either Rule 13e-3 or Rule 14a-9. One path consists of theories designed to show that the proxy solicitation was an essential link in the accomplishment of the merger for a reason other than that it gave the faction advocating the merger the votes needed for approval.¹⁸⁰ Falling under that rubric would be the theory rejected in *Virginia Bankshares*¹⁸¹ and a theory based upon an unsought injunction.¹⁸²

have foreseen the Sixth Circuit's conclusion. The Sixth Circuit had noted that, in a freeze-out merger situation, the appraisal option can not "rationally be exercised unless the majority is compelled to make full disclosure regarding appraisals, earnings projections and other information that sheds light on the value of the firm." *Howing I*, 826 F.2d 1470, 1476-77 (6th Cir. 1987) (quoting *Radol v. Thomas*, 772 F.2d 244, 255 (6th Cir. 1985), *cert. denied*, 471 U.S. 903 (1986)).

¹⁷⁶ *Howing III*, 972 F.2d at 709.

¹⁷⁷ *Id.* at 710.

¹⁷⁸ *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2765 (1991). As an example, Souter cited *Swanson v. American Consumer Indus., Inc.*, 475 F.2d 516 (7th Cir. 1973). *Id.*; see *supra* notes 121-22 and accompanying text for a discussion of the *Swanson* case.

¹⁷⁹ *Virginia Bankshares*, 111 S. Ct. at 2765-66.

¹⁸⁰ See *supra* notes 115-18 and accompanying text (discussing the "essential link" theory where majority shareholders have voting control).

¹⁸¹ This theory involved the supposed desire of majority shareholders to avoid bad relations with minority shareholders and the public. *Virginia Bankshares*, 111 S. Ct. at 2762; see *supra* notes 143-49 and accompanying text (discussing the Court's rejection of this theory).

¹⁸² A proxy solicitation which misled a minority shareholder into not seeking an

The other path a plaintiff might use to prove harm, seeking to show that the proxy solicitation was an essential link, involves foregone appraisal rights. If a proposed merger does not involve a freeze-out, there may not be sufficient funds to purchase many shares. Since a misleading proxy solicitation might convince a substantial number of shareholders not to exercise their appraisal rights, it could be described as an essential link in that it would keep the transaction from being subject to threatening financial drain.¹⁸³ This path would be especially relevant where the transaction is inevitable but the harm to a particular shareholder resulting from inadequate disclosure is not.¹⁸⁴

B. *Analyzing the Sixth Circuit's Analysis*

In *Howing III*, the Sixth Circuit attempted to explain its holding by using the language of *Mills* and stating that the proxy solicitation had been an essential link in the series of events that deprived the plaintiffs of their appraisal remedy.¹⁸⁵ Certainly, that is one of the more confusing explanations that the court could have provided. The court's explanation is confusing because it uses the concept of an essential step in a causal sequence in a different context than that of *Mills*. In *Mills*, the causal chain ended in the accomplishment of the transaction; *Howing III's*

injunction could qualify as an essential link because it would prevent the merger from being judicially frozen. However, based on *Virginia Bankshares*, a court would most likely reject an essential link theory involving a foregone injunction as well. An injunction would only stay the merger until disclosure which complied with the securities laws had been made. Once it had, the faction with the votes needed to approve the merger would use them and the merger would occur. The only conceivable hindrance would be that, during the period in which the injunction was in effect, the amount of bad publicity which resulted would dissuade the controlling party from completing the transaction. Such a possibility then relies upon the same *Schlick*-type theory that *Virginia Bankshares* repudiated. *Virginia Bankshares*, 111 S. Ct. at 2765.

¹⁸³ In fact, the possibility of appraisal actions draining funds can be a serious problem for a merger supported with limited resources. See Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 234-38 (1962). Further, some "merger plans expressly provide for termination if a certain percentage of shareholders exercise or take steps to exercise appraisal rights." Note, *supra* note 116, at 118.

¹⁸⁴ This path was used by the plaintiffs in *Swanson v. American Consumer Indus., Inc.*, 475 F.2d 516 (7th Cir. 1973). In *Swanson*, the court ruled that a violation of the disclosure rules caused the plaintiffs to lose the higher price that they would have received for their shares had they exercised their appraisal rights. See *id.* at 521; see *supra* notes 121-22 and accompanying text (for a discussion of the *Swanson* case).

¹⁸⁵ *Howing III*, 972 F.2d 700, 709 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1645 (1993).

seems not to lead to the transaction, but merely to the loss of the remedy. Thus, it appears that just as the Supreme Court in *Mills* formulated one broad method to show causation, the Sixth Circuit was trying to create another.

The basis of an argument that a proxy solicitation was an essential link in the loss of a state law remedy in *Howing III* would include the following facts: (1) there was a freeze-out merger covered by Rule 13e-3; (2) Rule 13e-3 requires disclosure to be made in a proxy statement or other form of communication;¹⁸⁶ (3) the disclosure made in the proxy statement sent to the shareholders was inadequate; (4) due to the merger, the plaintiffs were given the opportunity to have their shares appraised in state court; and (5) the plaintiffs did not utilize that opportunity. Based on these facts, the proxy solicitation was certainly an essential link in the chain of events leading to the plaintiffs' possession of an appraisal right and their subsequent loss of it. However, unlike the question of whether the proxy solicitation was an essential link in the accomplishment of the transaction, under these facts the proxy solicitation would always be an essential link in the loss of the appraisal right. Therefore, the "essential link" language is unnecessary. Like *Swanson v. American Consumer Industries, Inc.*,¹⁸⁷ *Howing III* only requires that a plaintiff show that there was a material violation of the disclosure rules in order to prove harm resulting from a lost appraisal right.¹⁸⁸

Since the Sixth Circuit's causation theory in *Howing III* would expand beyond *Mills* the class of plaintiffs able to recover, the theory must be submitted to the "policy reasons" analysis of *Blue Chip Stamps* in order to determine if the extension is permissible under *Virginia Bankshares*.¹⁸⁹ The Sixth Circuit attached a great deal of importance to the fact that its theory drew "its causal link from the enforceable terms . . . of the parties' corporate relationship."¹⁹⁰ Undoubtedly, this is an important fact under *Virginia Bankshares* for it tends to reduce the risk

¹⁸⁶ See *supra* note 21 (discussing items requiring disclosure under Rule 13e-3).

¹⁸⁷ 475 F.2d 516 (7th Cir. 1973); see *supra* notes 121-22 and accompanying text (discussing the *Swanson* decision).

¹⁸⁸ See *Howing III*, 972 F.2d at 709.

¹⁸⁹ See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 728, 737-49 (1975).

¹⁹⁰ *Id.* at 708. In *Virginia Bankshares*, the Court stated that the *Mills* theory came from the enforceable terms of the corporate relationship because, in *Mills*, the approval of a certain percentage of the shares was needed to effect the merger. See *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2762 (1991). In *Howing III*, however, the right to seek appraisal rights emanated from the enforceable terms of the corporate relationship that were supplied by the state in which Nationwide operated. See *Howing III*, 972 F.2d at 709.

of "speculative claims and procedural intractability"¹⁹¹ that so concerned the Court in *Blue Chip Stamps*.¹⁹² Other factors, though, might still make this risk significant.

One factor, particularly prominent in *Blue Chip Stamps*, that would increase the risk of speculative claims and procedural intractability is the opportunity for "self-serving testimony."¹⁹³ The reason for its prominence is that when someone claims damages for being misled into not buying or selling stock, there is no "objectively demonstrable fact"¹⁹⁴ on which to base recovery. A court would have to depend upon the plaintiff's oral testimony concerning both whether he would have bought or sold a security absent a misrepresentation and the number of shares involved.¹⁹⁵ In *Mills* and *Howing III*, however, oral testimony would only be needed to show whether the plaintiffs would have given their proxies or exercised their appraisal rights.¹⁹⁶ Therefore, the causation theories in both of these cases pose a lesser risk of speculative claims than that advanced in *Blue Chip Stamps*.

After acknowledging that there was a speculative element in the plaintiffs' causation theory,¹⁹⁷ the Sixth Circuit wrote that this element made the theory "no more speculative than [the theory] in *Mills*, and less so than the one rejected by the court in *Virginia Bankshares*."¹⁹⁸ By equating the speculative aspects of the *Mills* and *Howing III* theories, the court appears to be saying that it is as easy to accept a shareholder's testimony that he would have exercised an appraisal right had he not been misled as it is to accept that he would not have given his proxy under

¹⁹¹ *Virginia Bankshares*, 111 S. Ct. at 2765.

¹⁹² See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 743-49 (1978).

¹⁹³ *Virginia Bankshares*, 111 S. Ct. at 2765; see *Blue Chip Stamps*, 421 U.S. at 743 ("We in no way disparage the worth and frequent high value of oral testimony when we say that dangers of its abuse appear to exist in this type of action to a peculiarly high degree.").

¹⁹⁴ *Blue Chip Stamps*, 421 U.S. at 747.

¹⁹⁵ A court would have to determine both the number of shares that would have been bought and the number of shares that would have been sold. Uncertainties would include how many shares a person would have bought and whether a shareholder would have sought or could have obtained financing. Even the maximum shares that one would have sold would be a question of fact for dispute. For example, an investor might testify that he was on the verge of making a contract for a future sale of the security when the company released misleadingly positive information which deterred him.

¹⁹⁶ A proxy or appraisal action normally applies to all of the stock that an investor owns in a particular company.

¹⁹⁷ *Howing III*, 972 F.2d 700, 708 (6th Cir. 1992), cert. denied, 113 S. Ct. 1645 (1993).

¹⁹⁸ *Id.*

similar circumstances. However, the decision of whether to seek an appraisal remedy is a fundamentally more complex decision than the decision of whether to grant a proxy. Granting a proxy only requires a shareholder to consider the issues on which a vote will be held, sign a form, and mail it to the company. Exercising an appraisal right, on the other hand, often involves participation in a protracted process, up-front costs, and an indeterminate return.¹⁹⁹ One commentator has even suggested that although the values produced by an appraisal usually exceed the market value of a stock, appraisal proceedings are relatively rare due to these hindrances.²⁰⁰ In fact, the procedural problems of seeking appraisal have led many dissenting shareholders to seek a higher price for their shares by suing under a private right of action implied from the securities disclosure laws.²⁰¹

Finally, the Sixth Circuit's assertion that the theory of *Howing III* is less speculative than the theory in *Virginia Bankshares* is questionable. If the presumption of *Howing III* is applied,²⁰² as the presumption was in *Mills*, as an assumption about what most reasonable shareholders would have done, then the speculation required to adopt it can be seen as quite high. In a nonfreeze-out merger, where there are limited funds available for buying the stock of dissenting shareholders, *Howing III*'s theory would automatically lead to a conclusion that the merger would not have occurred had there been a sizable number of shares in minority hands. Even Justice Kennedy, in his *Virginia Bankshares* dissent, wrote that the theory that under state law "the merger would have been voidable absent minority shareholder approval" was more speculative than the theory that the majority rejected.²⁰³

¹⁹⁹ See Melvin Aron Eisenberg, *The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking*, 57 CAL. L. REV. 1, 85 (1969); Going Private Transactions by Public Companies or Their Affiliates, Exchange Act Release No. 34-14185, 42 Fed. Reg. 60,090, 60,091-60,092 (Nov. 23, 1977) ("[I]n practice [the appraisal] remedy is often cumbersome, expensive and ineffective."); *Green v. Santa Fe Indus., Inc.*, 533 F.2d 1283, 1297-98 n.4 (2d Cir. 1976), *rev'd on other grounds*, 430 U.S. 462 (1977) ("The Delaware statute is typical. The public shareholders are afforded no right to equitable relief under the statute and therefore are totally dependent upon the valuation figure settled upon by the appraiser.").

²⁰⁰ See Joel Seligman, *Reappraising the Appraisal Remedy*, 52 GEO. WASH. L. REV. 829, 856-57 (1984). Although this suggestion is tempered by the author having only included "reported" cases in his study, the author strongly implies that appraisal actions are just as infrequent among unreported cases. See *id.* at 829.

²⁰¹ See *id.* at 831.

²⁰² The presumption of *Howing III* is that the plaintiff shareholders, if given full and fair disclosure, would have (1) voted against the transaction, or not voted at all, and (2) exercised their appraisal rights within the ten-day statutory time limitation. See *Howing III*, 972 F.2d at 708.

²⁰³ *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2773 (1991) (Kennedy,

CONCLUSION

Despite the high degree of speculation in the *Howing III* theory, the Sixth Circuit accepted the theory by relying on the policy consideration of *Mills* that doubts should be resolved in favor of those the laws were designed to protect.²⁰⁴ Notwithstanding the fact that *Virginia Bankshares* identifies *Blue Chip Stamps* as the source from which the relevant policy concerns are to be gleaned,²⁰⁵ Justice Souter specifically rejected the argument for inferring congressional intent in the face of congressional silence. The *Virginia Bankshares* opinion explained that when Congress wished to protect certain classes of individuals, it knew how to do so.²⁰⁶ In the face of congressional silence, arguments for adoption of causal theories to expand the class of plaintiffs must meet the test of *Blue Chip Stamps*. The Sixth Circuit's theory in *Howing III* fails this test.

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J., dissenting).

²⁰⁴ See *Howing III*, 972 F.2d 700, 708 (6th Cir. 1992), cert. denied, 113 S. Ct. 1645.

²⁰⁵ See *Virginia Bankshares*, 111 S. Ct. at 2764.

²⁰⁶ See *id.*

